

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:NER:MAN:TL-N-1174-00  
OMendiburt

date:

to: Chief, Appeals Division, Manhattan  
Attn: Howard P. Kahn, Associate Chief Manhattan Appeals

from: District Counsel, Manhattan

---

subject:

EIN: [REDACTED]

Taxable Years Ended: December 31, [REDACTED]

Uniform Issue List # 6611.01-01

We have been asked for advice concerning the accrual of overpayment interest for the above listed taxpayer. Our advice relies on facts provided by [REDACTED], an Appeals Officer assigned to the case. The advice rendered in this memorandum is conditioned on the accuracy of the facts provided to us.

Issue:

Whether interest on a [REDACTED] overpayment credited to the [REDACTED] and [REDACTED] tax years accrues past the due date of the income tax return for the tax year in which the overpayment is applied.

Conclusion:

Interest on a [REDACTED] overpayment credited to tax years [REDACTED] and [REDACTED] should be allowed from the date of the overpayment to the due date of the tax return for the tax year to which the overpayment is credited.

Facts:

[REDACTED]  
On [REDACTED], the [REDACTED] ("taxpayer") timely filed its [REDACTED] tax return within the extension period. The Service audited the taxpayer's [REDACTED] tax return. On [REDACTED], the taxpayer made advanced payments of the deficiency and designated interest payments in anticipation

of the examination adjustments. On [REDACTED], a tax abatement of \$ [REDACTED] and a restricted interest abatement of \$ [REDACTED] posted to the taxpayer's transcript of account. These overpayments were applied to the [REDACTED] and [REDACTED] tax years in which additional tax assessments had been posted pursuant to an examination. Following is a table depicting the abatements and application of the resulting overpayment:

[REDACTED]	[REDACTED] Abatement - Tax	\$ [REDACTED]
[REDACTED]	[REDACTED] Abatement - Rest. Int.	\$ [REDACTED]
[REDACTED]	Interest on abatements	\$ [REDACTED]
[REDACTED]	Interest due taxpayer	\$ [REDACTED]
	Total overpayment	\$ [REDACTED]
	Amount applied to [REDACTED]	\$ [REDACTED]
	Amount applied to [REDACTED]	\$ [REDACTED]
	Total overpayment applied	\$ [REDACTED]    \$ [REDACTED]
	Overpayment refunded to taxpayer	\$ [REDACTED]

The interest on the [REDACTED] abatements was computed using an ending date of [REDACTED] for the portion of the overpayment applied to [REDACTED] and [REDACTED] for the portion of the overpayment applied to [REDACTED]. [REDACTED] represents the date on which the taxpayer made the advanced payments for the [REDACTED] deficiency and designated interest payments. [REDACTED] represents the due date for the first [REDACTED] estimated tax installment payment. Based on information in the file, these dates conform with the procedures that the Service Center was following at the time of the [REDACTED] overpayment.

[REDACTED]

On [REDACTED], the taxpayer timely filed its [REDACTED] income tax return within the extension period. This tax return reflected an overpayment of \$ [REDACTED] which the taxpayer elected to carry over to the subsequent year. With regard to [REDACTED], the taxpayer agreed to a tax deficiency at the examination level of \$ [REDACTED] which posted to the taxpayer's transcript of account on [REDACTED]. This assessment plus the interest due thereon was paid in its entirety by the [REDACTED] overpayment.

[REDACTED]

On [REDACTED], the taxpayer timely filed its [REDACTED] income tax return within the extension period. This tax return reflected a tax liability of \$ [REDACTED]. The credit elect from [REDACTED] was not needed to cover the [REDACTED] tax liability because the taxpayer had made the following estimated tax payments:

[REDACTED] \$ [REDACTED]

The taxpayer elected to carry over to [REDACTED] its [REDACTED] overpayment of \$ [REDACTED]. Portions of this credit elect were used to satisfy shortages in the [REDACTED] second and third estimated tax payments.

With regard to [REDACTED], the taxpayer agreed to an examination tax deficiency of \$ [REDACTED] which posted to the taxpayer's transcript of account on [REDACTED]. This assessment plus the interest due thereon was paid in its entirety by the [REDACTED] overpayment.

#### Discussion:

With respect to the [REDACTED] overpayment applied to [REDACTED], the taxpayer argues that the government had the use of the money until [REDACTED], the unextended due date of the [REDACTED] tax return. This is the date when the credit elect from [REDACTED] was used. According to the taxpayer, interest on the [REDACTED] overpayment applied to [REDACTED] should accrue until [REDACTED]. This argument is based on the "use of the money" theory from *Sequa Corporation v. United States*, 97-1 USTC ¶ 50,317 (S.D.N.Y. 1996), summary judgment granted by, dismissed by, 99-1 USTC ¶ 50,379 (S.D.N.Y. 1998) and *May Department Stores Co. v. United States*, 36 Fed. Cl. 680 (1996). The taxpayer claims that no amounts were due for [REDACTED] prior to [REDACTED] because the credit elect equaled or exceeded the amount of the deficiency.

The taxpayer makes the same argument for the overpayment applied to [REDACTED], except that overpayment interest should accrue until [REDACTED] because the government had use of the money until then. The present facts are distinguishable from the *Sequa* and *May Department Store* cases, because those cases dealt with underpayment interest. We look to section 6611 and the corresponding regulations providing for overpayment interest and the time period in which it accrues to resolve the issue.

Pursuant to section 6402(a), "the Secretary, within the

applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment..." See also, Treas. Reg. § 301.6402-1 ("The Commissioner...may credit any overpayment of tax, including interest thereon, against any outstanding liability..."). Interest, however, is not recoverable on an obligation owed by the Government unless explicitly provided by statute or contract. Rosenman v. United States, 323 U.S. 658, 663 (1945). The taxpayer claims a right to interest under section 6611. Section 6611(b)(1) provides that "interest shall be allowed and paid . . . [i]n the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken." (emphasis added). Treasury Regulation section 301.6611-1(h)(2) provides that, in general, the term due date means "the last day fixed by law or regulations for the payment of the tax."

Section 6151(a) provides that "when a return of tax is required under this title or regulations, the person required to make such return shall . . . pay such tax at the time . . . fixed for filing the return (determined without regard to any extension of time for filing the return)." See also, Treas. Reg. section 1.6151-1(a). Section 6072 governs the time for filing income tax returns stating that "[r]eturns of corporations [required] under section 6012 . . . made on the basis of a fiscal year shall be filed on or before the 15<sup>th</sup> day of the third month following the close of the fiscal year." See also, Treas. Reg. section 1.6072-2(a). Thus, the last day fixed by law for the payment of income tax is the due date of the return (determined without regard to any extension of time).

Overpayment interest runs only to the due date of the income tax return for the year in which the overpayment is applied, not the actual date the underpayment arose. Thus, the taxpayer's overpayment interest accrues until [REDACTED] with respect to the amount offset to [REDACTED] and until [REDACTED] with respect to the amount offset to [REDACTED]. In this case, the taxpayer

received a benefit because the Service Center computed the interest until [REDACTED] and [REDACTED] on the amounts applied to [REDACTED] and [REDACTED], respectively.

LINDA R. DETTERY  
District Counsel

By: \_\_\_\_\_  
PETER J. LABELLE  
Assistant District Counsel

Noted:

Linda R. Dettery  
District Counsel

cc: Peter J. Graziano  
Executive Assistant to Regional Counsel (via e-mail)

Theodore R. Leighton  
Assistant District Counsel (via e-mail)